

# A HYPOTHETICAL CASE: VALUE CAPTURE/JOINT DEVELOPMENT TECHNIQUES TO REDUCE THE PUBLIC COSTS OF PUBLIC IMPROVEMENTS

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Although we cannot yet say that value capture will be unfailingly successful in defraying the capital costs of development in all U.S. cities, it offers a major untapped source of transit revenue . . . . Most of the initiative for the use of value capture techniques must come from the local level.

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It has now been several years since Christopher Duerksen and I proposed a series of techniques to reduce the public sector costs of fixed guideway rapid transit systems.<sup>1</sup> While Mr. Duerksen has gone on to work more extensively in historic preservation and industrial siting problems, I have continued to work with the Rice Center for

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1. Callies & Duerksen, *Value Capture As a Source of Funds to Finance Public Projects*, 8 URBAN L. ANN. 73 (1974) [hereinafter cited as Callies & Duerksen].

Community Design and Research in Houston<sup>2</sup> to develop techniques for various cities (including Atlanta, Honolulu, Miami, Pittsburgh and Portland, Oregon) whose officials expressed interest in value capture techniques. By taking appropriate legislative or administrative action, many municipalities have either begun to incorporate these techniques into their legislative or constitutional frameworks,<sup>3</sup> or have employed them in practical decisionmaking as fixed guideway projects progress.

The past four years' field work and legal research have created a picture of the process that a municipality might usefully undertake if it wishes to proceed with a fixed guideway transit system—or, indeed, any public improvement with a fixed site that involves substantial costs to the public and special benefits to nearby property owners.<sup>4</sup> As noted in the earlier article,<sup>5</sup> any value thus conferred upon such neighboring property owners is arguably “unearned” since it results not from any effort by the owners, but rather is due to substantial expenditures (usually accompanied by heavy public debt) by a governmental entity customarily using general tax revenues. If the “unearned increment” can be thus “captured,” the result should be a corresponding reduction in public costs. The current “taxpayers’ revolt” over the high cost of government services makes such techniques worth pursuing.<sup>6</sup>

The hypothetical below basically follows the same detailed discussion of value capture/joint development theories of previous articles.<sup>7</sup> In brief, they include:

### 1. *Development of Air Rights*

A major opportunity for a public entity to share in the private benefits of an improvement (such as a fixed guideway transit system) is

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2. See C. SHARPE, R. EURY & D. CALLIES, *VALUE CAPTURE AND JOINT DEVELOPMENT APPLICATIONS* (1977).

3. For example, Honolulu is presently considering a package of amendments for value capture/joint development at the Hawaii decennial constitutional convention in 1978.

4. See, e.g., HAGMAN & MISCZYNSKI, *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* (1978) [hereinafter cited as *WINDFALLS*].

5. Callies & Duerksen, *supra* note 1, at 74.

6. The recent overwhelming passage of California's Proposition 13, reducing and putting a lid on property taxes as a source of government “income” is, of course, the most notorious example.

7. See note 20 *infra*.

through the private development of air or other property rights validly acquired by the entity but not needed for current operations. There are many examples of courts upholding public participation in private development of publicly acquired air space, notwithstanding constitutional "public purpose" limitations.<sup>8</sup>

## 2. *Excess Condemnation*

Where the purpose of acquisition is not solely to recoup the cost of a public venture, the acquisition of more land than necessary for the direct purposes of an authority's need is likely to be a valid exercise of eminent domain power, provided there is adequate statutory authority and a good plan sufficiently indicating the ultimate use of such land.<sup>9</sup> The term "excess condemnation" is a poor one since, as Nichols points out, it infers that more land is being taken than can be justified for the public use.<sup>10</sup> If this were really the case, such a taking would be unconstitutional.

Four theories have been used to justify so-called excess condemnations:

### a. *Essential to Operation of Facility*

Supplemental condemnation has been successful upon a showing that the purposes for which the land is acquired are reasonably essential to a successful operation of the facility.<sup>11</sup> "Reasonably essential" uses, which are not usually *directly* necessary for transit development, may include parking lots, stores, restaurants, hotels or other commercial facilities, or buffer landscaping that may help maintain property values in adjacent areas.

### b. *Future Use and Disposition*

A number of cases recognize the validity of supplemental condemnation for future expansion.<sup>12</sup> This approach allows the condemning authority to temporarily utilize the land to produce income, or even

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8. See notes 27-41 and accompanying text *infra*.

9. Callies, Williams & Sharpe, *Value Capture Policy*, 42 PLANNING 22 (October, 1976); 2A P. NICHOLS, *THE LAW OF EMINENT DOMAIN*, § 7.516 [1] (3d rev. ed. 1976) [hereinafter cited as NICHOLS].

10. NICHOLS, *supra* note 9, at § 7.5122, n.1.

11. See notes 60-70 and accompanying text *infra*. See also Callies & Duerksen, *supra* note 1, at 77-80.

12. See notes 46-49 and accompanying text *infra*.

sell the land outright should it later prove to be surplus. As in other supplemental condemnation cases, a court must rely on constitutional provisions and statutes that describe in detail the powers and duties of the public body involved.

c. *The Protective Theory*

A third theory that justifies supplemental condemnation is known as the protective theory. For example, city-owned land adjacent to transit stops could be sold under restrictions intended to preserve the amenity, or at least reduce the usual amount of blight caused by the transit system, and thus facilitate an increase in value of surrounding properties.<sup>13</sup>

d. *Remnant Theory*

Taking only the minimum land directly needed for the public project may leave many fragments of lots, the shape of which may render them separately valueless. A city or other condemning authority can be required to pay for the whole although it took only a part.<sup>14</sup>

The basic advantage of such acquisitions from a joint development/value capture perspective is that the additional property rights acquired can either be parceled together and sold for private development, used to enhance the attractiveness (and value) of surrounding areas, or used as noted above in the air rights discussion.

3. *Monetary Transfers*

Several cities are examining special benefit assessment and tax increment financing schemes for use as value capture techniques. As noted below, California has a special benefits assessment statute applicable to transit stops,<sup>15</sup> and the state of Florida has joined several other states in passing tax increment financing laws, this time for value capture/joint development purposes.<sup>16</sup>

a. *Special Benefit Assessment*

Assuming that evidence can be marshalled to show that transit

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13. See notes 54-56 and accompanying text *infra*.

14. See *Luby v. City of Dallas*, 396 S.W.2d 192 (Tex. Civ. App. 1965).

15. CAL. PUB. UTIL. CODE §§ 99000-99026 (Deering 1970).

16. FLA. STAT. ANN. § 163.387 (West Supp. 1979).

lines or stops do indeed confer special benefits, legislation could permit governmental agencies to establish special assessment districts encompassing either the transit line as a whole or just the immediate vicinity around transit stops. The owners of such land would be assessed a certain percentage of the system's cost, with individual obligations based on criteria such as lot size and distance from the transit station. Most state courts have been reluctant to interfere with legislative decisions that define the boundaries of analogous special benefit districts.<sup>17</sup>

b. *Tax Increment Financing*

Basically, tax increment financing is a method by which one municipal agency or corporation pledges all or a portion of the incremental tax revenue generated by a public improvement to pay for the cost of a project that has been created and initially paid for by a second agency. The amount pledged is generally derived from the ad valorem property taxes within the improvement district, and the incremental value thus accrued and reflected in the ad valorem property tax pays off the bonds issued by the developing agency. This device is particularly popular among local and federally-funded development agencies that must undertake major redevelopment projects.<sup>18</sup> One of the major advantages of such a system or technique is that no new taxes are levied or collected. Rather, the burden is spread over an extended period of time and falls upon whichever general purpose government is pledging the increments (or a portion thereof) created by the redevelopment.

This concludes a broad outline of the general value capture theory. What follows is a hypothetical analysis of the decisionmaking process from the perspective of the lead public entity and its principal legal advisor.

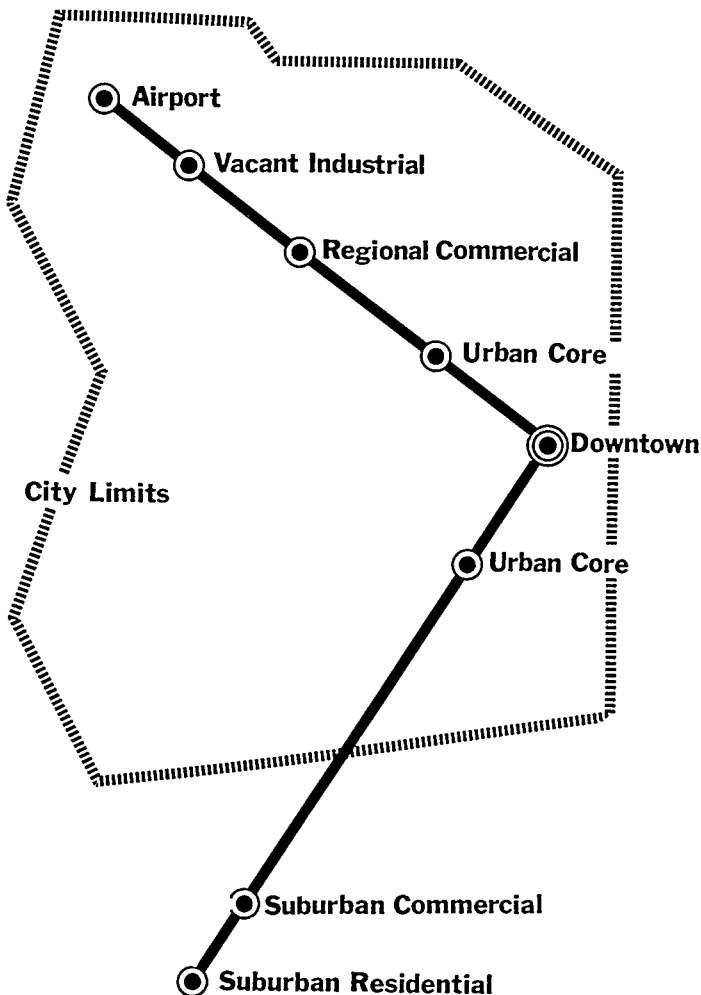
A HYPOTHETICAL CASE: THE METROPOLIS RAPID TRANSIT SYSTEM

Metropolis, a city of 1,500,000, received a tentative commitment from the Urban Mass Transportation Authority (UMTA) for \$500,000,000 to fund eighty per cent of a fifteen-mile fixed-guideway rapid transit system. The system will connect the central city area

17. See, e.g., CAL. PUB. UTIL. CODE § 99101 (Deering 1970).

18. See, RALPH ANDERSON & ASSOCIATES, REDEVELOPMENT AND TAX INCREMENT FINANCING BY CITIES AND COUNTIES IN CALIFORNIA (1976).

with high density communities both within and without the city limits,<sup>19</sup> ultimately ending at the local airport terminal. The alignment looks something like this:



The mayor and council, together with certain affected suburban

19. Pursuant to § 5(e) of the Federal Urban Mass Transportation Act of 1964, *as amended*, 49 U.S.C.A. §§ 1601-1614 (1976).

areas and the state, set about devising a method of raising the \$120,000,000 local share of the proposed costs. One of the sources they hope to tap is that part of the private sector which will substantially benefit from the location of the transit system. However, before fixing the alignment of the system and finally placing the stops thereon, the city first must determine what alternatives it has to reach the private sector. Accordingly, the city attorney's office has been asked by the mayor and council to prepare a list of alternatives for value capture/joint development for the city's review.<sup>20</sup>

### A. *Governmental Entity/Choice of Agency*

First the city attorney examined the power and authority of the potential transit operating and constructing bodies—state, county, city and special agencies<sup>21</sup>—and opted for using the city transportation department. Other things being equal, a general-purpose government (state, city, county) has more authority than a special-purpose agency, which is strictly limited by the scope of its legislatively-defined duties.<sup>22</sup> While the alignment passes through the

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20. For treatment of this subject generally see D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, §§ 176-77 (1971); WINDFALLS, *supra* note 4; SELECTED STUDIES IN HIGHWAY LAW (J. Vance ed. 1976) [hereinafter cited as Vance]; Callies & Duerksen, *Value Recapture: A Rose by Another Name*, 26 ZONING DIG. 5 (1974); Callies & Duerksen, *supra* note 1; Callies & Siemon, *The Value Capture Hypothesis: A Second Analysis*, 8 TRANSP. L.J. 9 (1976) [hereinafter cited as Callies & Siemon]; Callies, Williams & Sharpe, *Value Capture Policy*, 42 PLANNING 22 (October 1976); R. Batchelder, *Value Capture Policy: Prospects for Financing Public Investment in Mass Transportation* (Spring 1976) (thesis for Indiana University Graduate School of Business Administration T-590 [hereinafter cited as Batchelder]); Rice Center for Community Design & Research, *A Value Capture Policy: Legal Element* (November 1974) (study prepared for U.S. Dept. of Transp. DOT-TST-75-83 (1) [hereinafter cited as Legal Element]); Rice Center for Community Design & Research, *Value Capture and Joint Development Applications: Chicago, Louisville, Los Angeles* (January 1977) (study prepared for U.S. Dept. of Transp. DOT-TST-77-72) [hereinafter cited as Joint Development Applications].

21. For an excellent recent review of the powers and duties of various governmental entities and their relationship to the federal systems see D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM, CASES AND MATERIALS* (1977). For an example of a foreign institutional framework which seems to work well, see the discussion of Toronto, Montreal, and Ottawa in E. HOLMES, *COORDINATION OF URBAN DEVELOPMENT AND THE PLANNING AND DEVELOPMENT OF TRANSPORTATION FACILITIES*, 113-27, (1974) (U.S. GPO Stock #5001-00076) [hereinafter cited as HOLMES].

22. See generally 2 E. MCQUILLAN, *MUNICIPAL CORPORATIONS* §§ 4.03.14 (3d ed. 1966) [hereinafter cited as MCQUILLAN].

county and some separately-incorporated municipalities, most of the proposed line will lie within the territorial jurisdiction of the city. The city is an independent home rule city which, through its charter, is protected by the state constitution from legislative incursion across a range of areas including public transportation.<sup>23</sup> The city has the power to carry out a host of functions (including a general power of eminent domain) *and* the ability to amend its charter to provide further authority for joint development/value capture, if necessary. Moreover, the state constitution's local government article has an intergovernmental relations clause<sup>24</sup> specifically authorizing the kind of intergovernmental cooperation between the city and its outlying areas which the city attorney believes is necessary for the project's success. This full array of potentially vital powers is not available to a separate transit agency, which is a limited-authority creature of the state legislature. State level origin leads to more state domination and less freedom of action than the city desires.

A separate transit agency does have at least three potential advantages: first, the state can grant authority over construction and operation of a system, including the power to condemn, in any governmental jurisdiction through which a proposed alignment passes; second, the state can specifically tailor the agency to mass transit needs, with an appropriate array of powers such as eminent domain, taxation and intergovernmental contracting; finally, a separate agency presumably has a separate source of funds (*e.g.*, bonding power, or specific line items in state budget appropriations.) The funding weapon, however, can be a two-edged sword: the city has an established rating in the municipal bonds market and its issues, rated triple-A, get a most favorable borrowing rate. The bonds of a new agency, unless clearly backed by the state's full faith and credit, would be less marketable, and in any event the state has only a simple A rating.<sup>25</sup>

Of course, if the city were not a home rule municipality, the city attorney's opinion might differ. The county may be a useful transit developer, since it is a strong and relatively independent unit of government in this particular state. Its mass transit authority, however,

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23. *Id.*

24. *See, e.g.*, HAWAII CONST. § 6; ILL. CONST. art. 6.

25. Examples: Metropolitan Atlanta Regional Transportation Authority (MARTA) in Atlanta; Bay Area Rapid Transit (BART) in San Francisco.



is largely implied from a general state transportation statute,<sup>26</sup> which would probably need to be amended by the state legislature.

### B. *Public Purpose and Air Rights*

Among the potentials which the city has in mind is the joint development of several tracts at or adjoining some of the proposed transit stations. For example, it has already received tentative inquiries from several hotel chains concerning the location of a major hotel, on the surface, subsurface, and air rights, above one of the principal downtown stations (the transit system will likely be below grade at that point).<sup>27</sup> The group is using the Bonaventure development in downtown Montreal as its guide, with its complex of underground shops adjoining the station and hotel-office space above.<sup>28</sup> Further

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26. See, e.g., HAW. REV. STAT. § 51-1 (1968).

27. See RIVKIN & ASSOCIATES, INC., ACQUISITION OF LAND FOR JOINT DEVELOPMENT AND COMMUNITY DEVELOPMENT, MAIN REPORT 550-55 (1976) U.S. Dep't of Commerce, NITS PB 273-398 [hereinafter cited as MAIN REPORT]; R. WRIGHT, THE LAW OF AIRSPACE 259-64 (1968); Barton-Aschman Associates, *Multiple Use of Lands Within Highway Rights of Way*, in NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT No. 53, 55-56 (1968); Callies & Duerksen, *supra* note 20, at 92; Callies & Siemon, *supra* note 20, at 25; Legal Element, *supra* note 20, at 55-60; Daniel, Mann, Johnson & Mendenhall, *Valuation of Air Space*, in SELECTED STUDIES IN HIGHWAY LAW, at ch. V (J. Vance ed. 1976); Diris, *Use of Air Rights Over Urban Expressways*, TRANS. ENG. J. 357 (May, 1966); Hodgman, *Air Rights and Public Finance: Public Use in a New Guise*, 42 SO. CAL. L. REV. 625 (1969); *Joint Development Applications*, *supra* note 20, at 50, 104 & 160; Wright, *Airspace Utilization on Highway Rights of Way*, 55 IOWA L. REV. 761 (1970).

28. HOLMES, *supra* note 3, at 123-27; J. Dakin, Toronto Planning: A Planning Review of the Legal and Jurisdictional Contexts, from 1912 to 1970 (1974) (Dep't of Urban and Regional Planning, Planning and Design Paper No. 3, Univ. of Toronto), D. Dewees, Some Effects of Conversion from Streetcar to Subway Transit Lines in Toronto (1976) (Centre for Urban and Community Studies, Research Paper No. 76, Univ. of Toronto); U.S. DEP'T OF TRANSPORTATION, LAND USE IMPACTS OF RAPID TRANSIT, 34-54 (1977).

Apparently the Southern California Rapid Transit District has been advised it can deal in air rights, even participating in the development itself so long as some relation to the transit customer's convenience is maintained:

Section 30631 authorizes the District to acquire or construct all facilities necessary or convenient for rapid transit service together with such structures necessary or convenient for access of persons thereto.

In our opinion these broad powers would include the development of commercially oriented facilities designed for customer convenience as well as additional revenues.

In and about bus stations or fixed guideway stations the potential uses for surplus land and air rights would involve such commercial development as service stations and allied development, retail commercial uses and commercial parking.

out, near the airport, a major commercial developer, in conjunction with a motel chain, has made a similar proposal with respect to air rights where a station will be at grade level.

These proposals present the city attorney with several problems. First, there is the question of acquiring the sites. Although the existing city charter contains the power to construct and run any general transportation system,<sup>29</sup> and declares that any land acquired in furtherance thereof is for a "public purpose,"<sup>30</sup> the antiquated mass

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Insofar as locating interested businesses is concerned, prospective users of property available for sale or lease are normally sought through publicity and advertising or through the use of brokers.

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In conclusion, the District possesses the legal authority to use its stations, adjacent land and system air rights for commercial development. In order to evaluate fully the most desirable method of proceeding in such a venture, (i.e., sale, short/long term lease, etc.) and to assure a good working relationship with local governments, adequate lead time is essential. To this end, a comprehensive study of design and marketing considerations would undoubtedly be the first step toward developing a Board policy on customer services in the District.

R. Downs, Commissions, Lawyers and Air Rights (Dec. 23, 1964) (Memo to Jack R. Gilstrap, S. Cal. Rapid Transit Dist. General Manager).

29. See, e.g., Charter for City and County of Honolulu, 1959 Haw. Sess. Laws, act 261 (published at 2 HAW. REV. STAT. app. 1 (1968)).

30. See, e.g., *Poole v. City of Kankakee*, 406 Ill. 521, 523, 94 N.E.2d 416, 419 (1951) for broad definitions of public use/public purpose:

(1) that it affect a community as distinguished from an individual; (2) that the law control the use to be made of the property; (3) that the title so taken be not invested in a person or corporation as a private property to be used and controlled as private property; and (4) that the public reap the benefit of public possession and use, and that no one exercise control except the municipality.

Almost to the same effect is the definition found in *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Polcat Drainage Dist.*, 213 Ill. 83: "A public use means public usefulness, utility, advantage or benefit. It is not essential that the entire community or people of the State, or any political subdivision thereof, should be benefited or share in the use or enjoyment thereof. The use may be local or limited. It may be confined to a particular district and still be public. [Citation] If local or limited, the use must be directly beneficial to a considerable number of the inhabitants of a section of the State, and the property to be taken must be controlled by law, for the advantage of that particular portion of the community to be benefited." *Id.* at 527, 94 N.E.2d 419-20.

In *People ex rel. Adamowski v. Chicago R.R. Terminal Auth.*, 14 Ill. 2d 230, 151 N.E.2d 311 (1958), the Illinois Supreme Court upheld a statute authorizing the creation of rail terminal authorities and granting them broad powers to condemn and redevelop land in former railway terminal areas. In the process, the court stated:

"Public purpose" is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution. [Citation omitted]

transit code passed pursuant to that charter was for a trolley line in streets the city already owned and gave the city only the authority to

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The primary objects of the statute are the removal of the blighted conditions caused by antiquated terminal areas, the promotion of the growth and development of the city, and the relief of traffic congestion by extending streets through the areas and by furnishing off-street parking. Contentions that similar statutes did not serve a public use and a public purpose have been rejected. [Citation omitted] It may be that private railroad corporations will derive some benefit under the act. *Those benefits, however, will be incidental to the principal purpose of the statute*, as were the collateral benefits in the cited cases. The only portion of the area in which the railroad companies will have any direct interest will be the portion occupied by the new consolidated station and its approaches. The Authority will own and operate the facilities; the railroad companies will be its lessees. *These circumstances neither neutralize nor destroy the public purpose and public use that the General Assembly has found to exist.* (Emphasis added.) *Id.* at 235-36, 151 N.E.2d 314-315.

Recently the Illinois courts also upheld the Industrial Building Revenue Bond Act, ILL. ANN. STAT. ch. 24, §§ 11-74-1 to 11-74-13 (Smith-Hurd 1971), which permits municipal corporations to acquire and construct industrial facilities and to lease the same to private parties. *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972). Once again, the court set out in some detail a broad and liberal definition of public purpose:

It is urged that the Act, in establishing a scheme for leasing and ultimately conveying the property to a private tenant, is not an enactment for public purposes and thus contravenes section 1(a) of article VIII of the 1970 constitution, which provides: "Public funds, property or credit shall be used only for public purposes." We assume without deciding, that public funds or property in some manner may be involved, and that the "public purpose" test must be met.

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We have held on a number of occasions that if the principal purpose and objective in a given enactment is public in nature, it does not matter that there will be an incidental benefit to private interests. [Citations omitted] *While we acknowledge that there is a benefit to private interests in the financing of industrial projects under the Act, we hold that the principal purpose and objective of the Act is public in nature. Therefore, it does not matter that there will be an incidental benefit to private interests.*

In *Cremer v. Peoria Housing Authority* (1948), 399 Ill. 579, at 588, we recognized that what is for the public good and what are public purposes are, in the first instance, questions for the General Assembly to determine; that the legislature is vested with a large discretion; that its determinations are entitled to full consideration; and that courts are not warranted in setting aside such an enactment unless it is clearly evasive of or contrary to constitutional prohibitions. We find no clear evasion of a constitutional prohibition relative to the Act meeting the public purposes standard. (Emphasis added.) *Id.* at 354-55, 291 N.E.2d at 813.

See also *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 191, 339 A.2d 278, 289 (1975) ("Under our cases, projects reasonably designed to benefit the public by significantly enhancing the economic growth of the State, or its subdivisions, are public uses, at least when the exercise of the power of condemnation provides an impetus which private enterprise cannot provide"). *Accord*, *Tanner v.*

operate a mass transit system.<sup>31</sup> Therefore, the transportation code must be amended to provide the power to construct the system as well as run it.<sup>32</sup>

Second, there is the question of the degree of property interest to be condemned. At one downtown site the land is already owned in fee simple by the city (it is—or was—a municipal parking lot), so there is no question about title to surface, air and subsurface rights there. However, for the other sites the city attorney is concerned with the degree of taking which he can justify where the sole purpose of the condemnation is for a transit station. He anticipates that private owners will maintain that the city is entitled to take only what it needs—a subsurface interest downtown and a surface interest in the at-grade locations—leaving the valuable air, surface and subsurface rights not needed for stations and rights-of-way in the hands of the condemnees.<sup>33</sup> It is not clear from the charter that the city *must* take in fee simple, which would help resolve the question.<sup>34</sup> The state courts have never heard a case challenging the right of the city to take

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Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906). See Callies & Siemon, *supra* note 20, at 13-15.

31. See, e.g., D. CALLIES, S. LICHTENFELD, S. DIXON, R. EURY & R. HARMON, PRELIMINARY VALUE CAPTURE ANALYSIS FOR PROPOSED FIXED-GUIDEWAY RAPID TRANSIT SYSTEM, CITY AND COUNTY OF HONOLULU 19 (1978) (Report prepared for the City and County of Honolulu Department of Transportation Services).

32. *Id.* at 19-20.

33. For cases which so hold, see *Louisiana v. Jeanerette Lumber & Shingle Co.*, 350 So.2d 847 (La. 1977); *Krauter v. Lower Big Blue Natural Resources Dist.*, 199 Neb. 431, 259 N.W.2d 472 (1977); *Commonwealth v. Renick*, 21 Pa. Commw. Ct. 30, 342 A.2d 824 (1975). In *Renick*, the court stated:

Further, a construction of the words "title to lands" as meaning "estate in fee simple absolute" and hence requiring the Commission to take a greater interest than it needs, flies in the face of the principle that, inasmuch as property cannot constitutionally be taken by eminent domain except for public use, no more property may be taken than the public use requires—a rule which applies both to the amount of property and the state or interest to be acquired. Unless the statute expressly provides that a fee simple absolute estate must be taken which, as we have pointed out the instant statute does not, only an easement will be acquired by the condemnor, if that is all it requires. 3 Nichols, *The Law of Eminent Domain*, §§ 9-2[1][2][3] (3d rev. ed. 1974); *Truitt v. Borough of Ambridge Water Authority*, 389 Pa. 429, 133 A.2d 797 (1957).

*Id.* at 798, 342 A.2d 827.

34. For example, the courts in Pennsylvania have generally held that an agency can condemn only an interest in real property which is necessary for the intended public use, in the absence of express statutory language requiring the interest taken be in fee simple. *Lazarus v. Morris*, 212 Pa. 128, 61 A. 815 (1905).

in fee simple for all projects involving construction, which has been the city's policy in the past. Hopefully, counsel advises the city, he can justify the acquisition of air rights on the ground that technological requirements, potential severance damages, maintenance requirements, and the need to extinguish abutting owners' rights make such acquisition necessary.<sup>35</sup>

Assuming the city is able to obtain fee simple interest to all of the station land, there is some question of how it can use excess interests in land validly acquired.<sup>36</sup> If it opts to dispose of excess air, surface,

35. Allegheny County, which will construct a light rail transit system in Pittsburgh, has been so advised by its counsel. Robert M. Brown & David E. Johnson, Memorandum to Allegheny County (October 8, 1970).

36. Cousins & Heightchew, *Land Use and Transportation* ch. IV, in HIGHWAY USERS FOUNDATION TECH. STUDY MEMO. NO. 11 (1975); ATLANTA REGION COMMISSION, PUBLIC/PRIVATE JOINT DEVELOPMENT AND RECOMMENDED MODELS FOR PUBLIC/PRIVATE JOINT VENTURES FOR RAPID TRANSIT STATION AREA DEVELOPMENT 33 (1974). But see ATLANTA REGIONAL COUNCIL, THE DEVELOPMENT OF AIR RIGHTS AND EXCESS PROPERTY, (1978), for how such property can be used. See also Callies & Siemon, *supra* note 20, at 24; Callies & Duerksen, *supra* note 20, at 92; *Legal Element*, *supra* note 20, at 55. Illinois has considered the question in *People ex rel. Adamowski v. Chicago R.R. Terminal Auth.*, 14 Ill. 2d 230, 151 N.E.2d 385 (1958):

[T]he Authority is authorized to acquire by gift, purchase or *eminent domain* the property located within the boundaries of such area. [Citations omitted] Upon acquisition the Authority is authorized to remove the existing terminals, terminal facilities, freight facilities and other buildings and structures located within the area and install and construct streets, utilities and site improvements; construct and operate a new consolidated railroad terminal, terminal facilities and approaches thereto; enter into leases and contracts with railroad companies for use by said railroad companies of such terminal and terminal facilities; *enter into contracts and leases for the operation of restaurants, stores or other enterprises commonly found in a terminal station*; make provision for off-street parking; *convey real property in the area not required for the construction and operation of the new terminal approaches thereto to public bodies for streets, alleys, schools, parks and playgrounds and for other public purposes and to convey any land not needed for the foregoing purposes to private individuals and corporations for redevelopment by private enterprise in accordance with a redevelopment plan* to be approved by the Authority and the city council of the city.

*Id.* at 234-35, 151 N.E.2d at 314 (Emphasis added). The enabling legislation for the Chicago Transit Authority (CTA) expressly contemplates disposition of "excess" property by either sale or lease:

Section 11. Lease, Sale or Other Disposition of Property.

The Grantee may lease, sell or otherwise dispose of any property in its property accounts which is no longer necessary, appropriate, or adapted to the proper operation and maintenance of the Transit System. Any property so sold or disposed of shall be removed from the property accounts of the Grantee.

The net rental or net income arising from the leasing of any property in the property accounts of the Grantee shall constitute and be part of the gross revenues of the Grantee but only so long as such property is used or useful as operat-

or subsurface interests outright, there is a good argument for doing so

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ing transportation property. Chicago, Ill., Metropolitan Transit Authority Act (April 23, 1945).

According to CHICAGO TRANSIT AUTHORITY, REAL ESTATE PRACTICES AND PROCEDURES, CLAIMS LAW/REAL ESTATE DEVELOPMENT (1975), a manual on real estate practices and procedures, disposition of "surplus" property is handled by the Real Estate Department. That department analyzes the CTA's holdings from time to time to determine where real property rights are not necessary for present or future needs. The manual lists several examples, including air spaces over transit lines and station facilities, surface spaces over and alongside subsurface transit facilities, surface spaces beneath transit facilities such as aerial structures, excess land lying outside of CTA right-of-way, and surface space required for future transit development such as the expansion of parking facilities at station areas. *Id.* at 29.

When it is decided to *sell* property rights (as opposed to lease), the CTA engages in limited value capture: "Sale or long-term grants of excess property rights within developing economic zones *shall be deferred until substantial value appreciation has accrued as a result of this development* . . . . Generally, CTA participation will be through its land ownership, with the aim of achieving optimum return, while retaining maximum control." *Id.* at 31. (Emphasis added). Indeed, there is considerable evidence of such private uses on transit district property in Chicago. Having acquired much of the system from a multitude of private rail companies in the 1940's, the CTA also acquired a number of leaseholds for purposes such as newspaper and food vending. Although many of those tenancies were year-to-year in nature, many have been continued, generally in the area of transit stops. Interview with Thomas Kennedy & Sal Bianchi, attorneys for the CTA, in Chicago, Ill. (February 1974). Most of the news and food vendors clearly serve the convenience of the transit system's patrons as well as provide additional revenue for the system.

See also ILL. REV. STAT., ch. 121, §§ 314a26-314a54 (1978), which permits the Illinois Tollway Commission:

To contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of any toll highways, excluding the paved portion thereof, but including the right of way adjoining, under, or over said paved portion for the placing of telephone, telegraph, electric, power lines and other utilities, and for the placing of pipe lines, and to contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of the toll highways, excluding the paved portion thereof, but including the right of way adjoining, *or over said paved portion for motor fuel service stations and facilities, garages, stores, hotels and restaurants*, or for any other lawful purpose, except for the tracks for railroad, railway or street railway use, and to fix the terms, conditions, rents, rates and charges for such use.

*Id.* at § 314a34. (Emphasis added). Acting pursuant to such authority, the Tollway Commission has leased space to a number of commercial restaurant and gasoline service station establishments both adjoining and over tollways in Illinois.

The Illinois Municipal Code specifically grants every municipality power to deal in air space by means of long-term leases:

Every municipality has the power to lease the space above and around buildings located on land owned or otherwise held by the municipality to any person for any term not exceeding 99 years.

Every municipality has the power to lease, in the same manner and for a simi-

under the constraints set out in its charter.<sup>37</sup> Those constraints were drafted to provide for the orderly disposition of used equipment.

lar term, any space over any street, alley, or other public place, in the municipality, more than 12 feet above the level of the street, alley, or other public place, to the person who owns the fee or a leasehold estate, for a term not less than that of the proposed lease, in the property on both sides of the portion of the street, alley, or other public place so to be leased, whenever the corporate authorities of the municipality are of the opinion that that space is not needed for street, alley, or other public purpose, and that the public interest will be subserved by such leaseings. The leasing of such a space shall be authorized by ordinance. In this ordinance the lease and its terms shall be set forth with reasonable certainty.

ILL. REV. STAT., ch. 24, § 11-75-1 (Smith-Hurd 1962). For sheer power to undertake such development, nothing can beat CALTRANS and its authority to utilize so-called "surface" rights over and beneath highways in its right-of-way. The statutory authority, though never tested in court, is very broad:

The department may lease to public agencies or private entities for any term not to exceed 99 years the use of areas above or below state highways, subject to such reservations, restrictions and conditions as it deems necessary to assure adequate protection to the safety and the adequacy of highway facilities and to abutting or adjacent land uses . . . . Prior to entering into any such lease, the department shall determine that the proposed use is not in conflict with the zoning regulations of the local government concerned. Such leases shall be made in accordance with procedures to be prescribed by the California Highway Commission, except that in the case of leases with private entities such leases shall only be made after competitive bidding unless the commission finds by unanimous vote that in certain cases competitive bidding would not be in the best interests of the state. The possibilities of entering into such leases and the consequent benefits to be derived therefrom may be considered by the department in designing and constructing such highways. Revenue from such leases shall be deposited in the State Highway Fund.

CAL. STS. & HY. CODE § 104.12 (Deering 1978). On the strength of its statutory authority, CALTRANS has issued a series of implementing regulations:

#### 10.001 Mission

The Mission of the Airspace Development unit is to implement a positive program of airspace development and nonoperating right of way. Such a program must be sensitive to local community needs and should insure the achievement of the following major goals:

1. To integrate highways into the community in a manner which is compatible with local planning goals and objectives through multiple use of highway rights of way.
2. To increase the local tax base through development of airspace to its highest and best use.
3. To reduce the amount of private property utilized for highway support facilities and other public uses.
4. To enhance and protect the transportation corridor and its environs.
5. To increase the return on the taxpayers' investment through rental revenue.

#### 10.002 Airspace Defined

Airspace is any property within the highway right of way limits which is capable of other uses without undue interference with the operation and possible fu-

Nonetheless, there is no exclusion for real property interests, and the

ture expansion of the transportation corridor for highway or other transportation uses.

It may consist of surface rights under a viaduct structure, the space above the traveled lanes, space within a loop of an interchange, or space between the main lanes and on or off ramps, of area in cut or fill slopes.

Airspace may also include excess parcels when the combination of excess land and airspace will result in substantially better land utilization than could be attained if developed separately.

#### 10.003 Responsibilities of the Airspace Development Section

1. Development of a positive program for maximum utilization of highway airspace consistent with the planning objectives and goals of the local communities.
2. Administration of all freeway lease areas and airspace.
3. Identification of potential airspace sites and maintenance of the Airspace Site Inventory.
4. Implementation of the Marler-Johnson Highway Park Act, Section 14012 of the Government Code.
5. Implementation of Section 104.15 of the Streets and Highways Code dealing with the use of excess land for park and recreational purposes.
6. Liaison with the Community and Environmental Factors Unit in identifying the multiple-use concepts developed in the planning and design process.
7. Implementation of Multiple-use concepts developed in the planning and design process.
8. Coordination with the District Maintenance and Landscape Departments in locating highway maintenance facilities on airspace.
9. Cooperation with State, federal and local agencies in location of governmental facilities on highway airspace.
10. Cooperation with private industry in development of improvements on sites suitable for such use.

#### 10.004 The Use of Airspace for Building Improvements

It is *the responsibility of the Airspace Development Unit to encourage the construction of building improvements on highway airspace* when it has been determined that:

1. construction of improvements will not conflict with necessary future expansion of the highway facility for highway or other transportation modes,
2. the proposed use will tend to integrate the freeway into the community and is acceptable to the local community as being consistent with local planning or zoning ordinances,
3. *the proposed use will result in an increase in the local tax base, or result in other substantial community benefits,*
4. *the proposed use is economically sound and a fair market rent can be obtained,*
5. the proposed use is aesthetically and functionally compatible with the highway corridor and its environs.

CALTRANS, RIGHT OF WAY MANUAL, ch. 10 (April 20, 1962) (Emphasis added). Acting under this broad authority, CALTRANS has leased space under the Santa Monica Freeway for a 248-unit warehouse and at Culver City for commercial shopping center parking. Interview with W.H.L. Parrish and Darrell Haynes in Sacramento, Cal. (August 28, 1975). There are plans in Los Angeles to lease space under



complex and time-consuming notice and public bidding requirements will make negotiations with private interests for a unified station development package difficult.<sup>38</sup> Indeed, if the city decides to retain ownership and “dispose” of leasehold interests, it must proceed under a theory that supports a “partnering” with the private sector; such theories may include the duty to make the most of excess city property<sup>39</sup> or the duty to leave actual development—and the advantages a private developer may obtain by working with a governmental “partner”—to the private sector as being wholly beyond the purview of a government.<sup>40</sup> Of course, one of the downtown stops may be located within a redevelopment district, which would proba-

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other freeways for industrial buildings and auto dealerships, using the underside of the freeway for roofing. In Sacramento, the Sacramento Transit District leases space under the freeway to store its buses, and under U.S. 80 there is a commercial parking lot for recreational vehicles. Over the Capitol Street Bridge in Sacramento there are plans for a restaurant over the Sacramento River. Such programs produce between \$6 and \$8 million per year for CALTRANS. *Id.*

37. Pennsylvania imposes specific restraints on acquisition and disposition of excess property. *See Starky v. Philadelphia*, 397 Pa. 512, 156 A.2d 101 (1959); *Dickel v. Bucks-Falls Elec. Co.*, 306 Pa. 504, 160 A. 115 (1932); *Lazarus v. Morris*, 212 Pa. 128, 61 A. 815 (1905); *E. SNITZER, PENNSYLVANIA EMINENT DOMAIN* 123 (1965). Florida statutes formerly empowered a municipality to sell or lease property, including air rights, no longer needed for a public use. *FLA. STAT. ANN.* §§ 167.77 (West 1966) (repealed 1973). Many states still so provide: *Pennsylvania*, 53 PA. CONS. STAT. ANN. § 345(a) (Purdon 1974) (parking authorities), *upheld* in *Price v. Philadelphia Parking Auth.*, 422 Pa. 317, 221 A.2d 138 (1966):

In order to assist in defraying its expenses, the Authority is also empowered by the enabling act “to lease portions of the street level or lower floors of . . . parking . . . [facilities] for commercial use. . . .” *Ibid.* However, leases of such commercial space within Authority facilities are subject to the explicit statutory requirement that they be entered into “on a fair competitive basis.” *Ibid.* Thus, the enabling act distinguishes between the leasing of facilities for operations as an Authority parking garage and the leasing of commercial space for incidental, revenue producing purposes, explicitly mandating that the latter commercial leases be granted only on the basis of competitive bidding. *Ibid.* It is clear, therefore, that the power to lease air-rights is an aspect of the Authority’s power to lease non-parking commercial space and only incidental to its primary purpose of providing parking facilities for the general public.

*Id.* at 146.

38. *See Legal Element, supra* note 20, at 55.

39. Several jurisdictions apparently favor this approach, and sometimes statutes clarify such a purpose. *See, e.g., Sunny Isles Fishing Pier Inc. v. Dade County*, 79 So. 2d 667 (Fla. 1955); *Gate City Garage Inc. v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953).

40. *See, e.g., Tippins v. Cobb County Parking Auth.* 213 Ga. 685, 100 S.E.2d 893 (1957).

bly permit virtually any mix of private-public venturing, given the breadth of the operable statutes and the federal and state case law permitting wholesale condemnation, leasing, selling, and partnering with the private sector in order to stamp out blight.<sup>41</sup>

### C. *Public Purpose and Excess Condemnation*

The city has also expressed an interest in acquiring real property in fee at the perimeter of its proposed at-grade stations so that it can jointly develop additional land made developable by proximity to a proposed stop. The city attorney has isolated a number of theories under which he might proceed to acquire this so-called "excess" land.<sup>42</sup>

41. See, e.g., *Rubinoff v. District Court*, 145 Colo. 225, 360 P.2d 114 (1961); *City of Jacksonville v. Griffin*, 346 So. 2d 988 (Fla. 1977); *Bailey v. Hous. Auth.*, 214 Ga. 790, 107 S.E.2d 812 (1959); *Hawaii Hous. Auth. v. Schnack*, 39 Haw. 543 (1952); *Miller v. City of Louisville*, 321 S.W.2d 237 (Ky. 1959); *Spahn v. Stewart*, 268 Ky. 97, 103 S.W.2d 651 (1937); *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769 (1966); *Schenck v. Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950); *Belovsky v. Redev. Auth.*, 357 Pa. 329, 54 A.2d 277 (1947); D. MANDELKER, *HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND* 81-118 (1973). For a brief summary of cases, see Annot., 6 A.L.R.3d 297 (1966).

42. For a summary of the changing concept of public use and public purpose, see Vance, *supra* note 20, at 767-70; Callies & Duerksen, *supra* note 1, at 74; Callies & Siemon, *supra* note 20, at 11-12; *Legal Element*, *supra* note 20, at 1-4. The old view is represented by *Pennsylvania Mutual Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 A. 904 (1913); the new view by *City of Jacksonville v. Griffin*, 346 So. 2d 988 (Fla. 1977); *Basehore v. Hampton Indus. Dev. Auth.*, 433 Pa. 40, 248 A.2d 212 (1968); and *Washington Park, Inc. Appeal*, 425 Pa. 349, 229 A.2d 1 (1967). See *Dorman v. Philadelphia Hous. Auth.*, 331 Pa. 209, 200 A. 835 (1938), where the court said:

[V]iews as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that to-day [sic] there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of "public use" naturally expands in proportion. 248 A.2d at 217.

*Id.* at 221, 200 A. at 840. A recent California decision found that "'necessity' does not mean an absolute but only a reasonable or practical necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit." *Monterey County Flood Control & Water Conserv. Dist. v. Hughes*, 201 Cal. App. 2d 197, 213, 20 Cal. Rptr. 252, 262 (Dist. Ct. App. 1962). See also *County of Los Angeles v. Law Bldg. Corp.*, 254 Cal. App. 2d 848, 62 Cal. Rptr. 542 (Dist. Ct. App. 1967) (holding questions of necessity for taking property lie exclusively within the purview of the condemning body, and are not subject to judicial review absent fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it formally had resolved).

1. *Ancillary Structures/Services.* As the city is the condemnor, there are a variety of uses—whether or not transit related—for which the city could condemn, and if such condemnation were in fee simple, the analysis would be much the same as under the previous section.<sup>43</sup> Thus, for example, the city could decide to place a parking lot adjoining the station, either for transit purposes or to effectuate the city's general parking policy. Experts generally support parking as sufficiently ancillary to a transit system so that condemnation is acceptable for its accomplishment and many transit statutes specifically so provide.<sup>44</sup> Of course, if the operative agency were only a special purpose transit district, then the number of theories upon which it could acquire adjacent land would be reduced substantially to include only those acquisitions which relate to "transit purposes," as defined by an appropriate enabling statute and, ultimately, confirmed by the courts. Even if so restricted, however, such a special-purpose agency could probably condemn land for parking and other services necessary for public transit. If the enabling statute empowered the special purpose district to condemn land necessary and "convenient," then the scope of such acquisitions could be considerably expanded.<sup>45</sup> The city attorney has on other occasions suggested to the city that he would be more comfortable if the ancillary uses could be

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Somewhere in between the old and new views are cases like *Port of Umatilla v. Richmond*, 212 Or. 596, 321 P.2d 338 (1958).

43. See notes 37-40 and accompanying text *supra*.

44. See *Gate City Garage v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953); *Poole v. City of Kankakee*, 406 Ill. 521, 94 N.E.2d 416 (1950) in which the court said:

As we view it, there is involved the safety and well-being of all the residents of a community so affected. To provide for off-street parking facilities is certainly a step to meet the public need. We are of the opinion that the Parking Act embraces the taking of land for a public use.

Appellees' objections which go to the operation of the act do little to alter that conclusion. *The argument that the use is private because it enables a municipal corporation to enter into business in direct competition with individuals who are now operating parking lots cannot be sustained.*

406 Ill. at 529, 94 N.E.2d at 420 (Emphasis added).

See also *Seligsohn v. Philadelphia Parking Auth.*, 412 Pa. 372, 194 A.2d 606 (1963).

45. The difference between "convenience" and "necessity" was discussed in *Moon Township Appeal*, 387 Pa. 144, 127 A.2d 361 (1956), a case concerning tax exemptions for concessions at a municipal airport:

That these commercial activities all served the *convenience* of the traveling public is undisputed, but that is not enough to warrant a tax exemption; it must be shown that they were *needed for the efficient operation of the Airport* as a public instrumentality and thereby partook of the character of its own public use. *Id.* at 150-51, 127 A.2d at 364-65 (Emphasis added).

characterized as "incidental."<sup>46</sup>

2. *Future Use.* As in most states, case law supports the acquisition of additional real property (beyond alignment and stations) for reasonably anticipated future expansion of the system,<sup>47</sup> both around proposed stops and at points along the alignment where future stops may be placed. However, such future acquisitions must be in accord-

46. See, e.g., *Panama City v. State*, 93 So. 2d 608 (Fla. 1957); *Gate City Garage v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953); *Adams v. Hous. Auth.*, 60 So. 2d 663 (Fla. 1952).

In *Monterey County Flood Control & Water Conserv. Dist. v. Hughes*, 201 Cal. App. 2d 197, 20 Cal. Rptr. 252 (Dist. Ct. App. 1962), the court, with a minimum of statutory help, concluded that "excess" land could be taken for a flood control project in order to provide recreational facilities:

In view of the fact that recreational uses are clearly related and *incidental to* the maintenance and operation of a dam and reservoir for flood control and water conservation purposes, and also recognizing the strong public interest in such recreational uses as shown by legislative declarations and approval, we believe that under the act the power of eminent domain would include the taking of property for such related and incidental uses.

*Id.* at 205, 20 Cal. Rptr. at 257 (Emphasis added). One of the broadest definitions of public project, for which a variety of agencies are empowered (by reference) to condemn, is set out in the Kentucky statutes:

"Public project" means any lands, buildings, or structures, works or facilities (a) suitable for and intended for use as public property for public purposes or suitable for and intended for use in the promotion of the public health, public welfare or the conservation of natural resources, including the planning of any such lands, buildings, structures, works or facilities; or (b) suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related business facilities of a community, including such structures as concert halls, museums, stadiums, theaters and other public facilities, together with related and appurtenant parking garages, offices and office buildings for rental in whole or in part to private tenants, dwelling units and apartment buildings for rental in whole or in part to private tenants, commercial and retail businesses, stores or other establishments, and any structure or structures or combination of the foregoing, or other structures having as their primary purpose the creation, improvement, revitalization, renewal or modernization of a central business or shopping community, and shall also include existing lands, buildings, structures, works and facilities, as well as improvements or additions to any such lands, buildings, structures, works or facilities.

KY. REV. STAT. ANN. § 58.010(1) (Baldwin 1975).

47. See generally *People v. Cramer*, 14 Cal. App. 3d 513, 92 Cal. Rptr. 401 (Ct. App. 1971); *Boalsburg Water Co. v. State College Water Co.*, 240 Pa. 198, 87 A. 609 (1913); Vance, *Advance Acquisition of Highway Rights-of-Way*, in 2 SELECTED STUDIES IN HIGHWAY LAW 903 (J. Vance ed. 1976); Callies & Duerksen, *supra* note 1, at 81-83; Callies & Siemon, *supra* note 20, at 22-23; *Legal Element*, *supra* note 20, at 17-23.

ance with a well-defined and comprehensive plan for the systems,<sup>48</sup> reasonably related to expected future needs,<sup>49</sup> and usable within the reasonably foreseeable future.<sup>50</sup>

In fact, on the theory that land values appreciate, some courts have nearly implied a *duty* to acquire land in advance of need.<sup>51</sup> There-

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48. *State v. 14.69 Acres of Land*, 226 A.2d 828 (Del. 1967); *City of Jacksonville v. Griffin*, 346 So. 2d 988 (Fla. 1977); *Pidstanski v. South Whitehall Township*, 33 Pa. Commw. Ct. 162, 380 A.2d 1322 (Commw. Ct. 1977).

The record demonstrates that the Township's actions, rather than being arbitrary, were carefully planned and painstakingly thought out with a view toward present and future requirements. Acquisition of the land bordering the Jordan Creek and lying between two historically important covered bridges was first discussed by Township officials in 1966, and that year *initial studies of the area as a park were made by the Township's Planning Commission*. In 1968 the Park and Recreation Board, after studying existing recreation facilities, recommended setting aside a large plot of ground of considerable acreage for a community park. The Jordan Creek site was a natural choice for such a park due to its size, low acquisition cost, the historic character of the covered bridges, and the scenic beauty of the Jordan Creek. *The year 1968 also marked the completion of the Township's comprehensive plan which contained a recommendation that the Township acquire several hundred acres as recreational land and specifically endorsed development of the proposed park site*. Two years later, a survey of Township residents demonstrated strong community backing of a multi-purpose community park and recreation facility. Also in 1970, the Joint Planning Commission for Lehigh and Northampton Counties stated that *the proposed park was an important element in the long-range plan for development of the region*. Finally, *the Township's plans were thoroughly reviewed by both the Pennsylvania Department of Community Affairs and the United States Department of Housing and Urban Development, pursuant to applications by the Township for grants-in-aid*. Both the state and the federal government approved the project and granted funding.

These facts and the entire record clearly demonstrate that the Township's decision to devote these 80 acres along the Jordan Creek to park and recreational uses was based upon its informed perception of the Township's present and *reasonably foreseeable future needs*.

*Id.* at 167-68, 380 A.2d at 1324-25 (Emphasis added). See *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 P. 1064 (1923).

49. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959); *Truitt v. Borough of Ambridge Water Auth.*, 389 Pa. 429, 133 A.2d 797 (1957).

50. While courts have struck down periods as long as 30 years, as in *State v. 0.62033 Acres of Land*, 49 Del. 90, 110 A.2d 1 (1954), and *Grand Rapids Bd. of Educ. v. Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1954), periods of 15 or 20 years have been held reasonable. *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951); *Carlor Co. v. City of Miami*, 62 So. 2d 897 (Fla. 1953). The period may, of course, be limited specifically by statute, which does not necessarily affect the courts' determination of reasonableness, but will usually be given considerable weight in so deciding. See Vance, *supra* note 20, at 931.

51. *Clemmer v. Pennsylvania Pub. Util. Comm'n*, 207 Pa. Super. Ct. 388, 217 A.2d 800 (1966).

fore, the city attorney advises Metropolis that it may indeed acquire a mix of property rights around the alignment and stops, *provided* it first notices, publishes, holds hearings upon, and adopts a plan setting out expected future needs; sets out a tentative budget for development of those sites; and projects such needs no further forward than fifteen years.

The city attorney relies primarily on the state's school, highway, and airport site acquisition law for this advice.<sup>52</sup> He also advises Metropolis that the sites thus acquired may be used in the interim not only for other municipal purposes, but also for private-sector uses such as parking, open air markets, and even "temporary" structures, on the theory that Metropolis is obligated to make the best use of municipal property under its control. Of course, the discussion above pertaining to the use of municipal property for essentially private uses would be applicable to any lease or other arrangements with the private sector, but the fact that the use contemplated is temporary would help make it permissible. The city attorney also advises the city that, as with any municipal property, the city could dispose of the property or hold it for other purposes if it should develop that the

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52. *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923); *City of Waukegan v. Stanczak*, 6 Ill. 2d 594, 129 N.E.2d 751 (1955); *City of Chicago v. Vaccarro*, 408 Ill. 587, 97 N.E.2d 766 (1951); *Cochran v. Cavanaugh*, 252 S.W. 284 (Tex. Civ. App. 1923).

The extent to which such "future acquisitions" are currently favored by the courts is evident from *Hayward Union High School Dist. v. Madrid*, 234 Cal. App. 2d 100, 44 Cal. Rptr. 268 (1965), in which the court upheld an acquisition of property by a school district for a school site even though it may never have been the intention of the district to use the land for a new school, as represented, and even though the district fully intended to sell it after a few years, provided the interim use was for some school purpose—here, for storage and temporary buildings:

As to the allegation that the district knew that conditions would require the sale of the property by the district after a few years—that fact could not constitute a defense in the condemnation action. The fact that it was needed for school purposes in the interim would permit the exercise of eminent domain.

It should be pointed out that even if the school district did not build new school buildings as represented this would not constitute fraud. The district had the right to condemn for any school purpose and on acquisition, to change to some other school purpose any time during its ownership of the property. So there could be no cause of action for fraud in this respect. If the district determines that the property is no longer desirable for school purposes and elects to sell it to the city, it has the right to do so (see *Newport v. City of Los Angeles*, *infra*, [1960] 184 Cal. App. 2d 229, 239, 7 Cal. Rptr. 497).  
*Id.* at 121-22, 44 Cal. Rptr. at 281.

property is not needed.<sup>53</sup> Although there is no supporting case law in the state, the city attorney notes that other jurisdictions have so held, in spite of claims by condemnees that they are entitled to recover the property if the use for which it was acquired does not materialize.<sup>54</sup>

3. *Remnant Acquisitions.* Metropolis' tentative station and alignment acquisition plans include only portions of a number of parcels. To the extent that remainder interests of potential condemnees may be characterized as physical or economic remnants, the city attorney advises Metropolis that it may acquire such parcels by eminent domain.<sup>55</sup> Indeed, if certain federal relocation legislation is applicable, it may *have* to acquire such parcels.<sup>56</sup> Since some potential remnants are located at the regional commercial and suburban commercial stops, land not needed for stops may be leased or sold for development.

The *size* of the remnants which the city may acquire under this theory will depend largely upon the facts of the individual situations. For example, one parcel consisting of eighteen acres is just barely included in the stop near the airport in an industrial development area. The alignment in that area is in the median of an expressway, and the stop acquisition requires condemnation of a two-acre strip along a frontage road. The city would like the whole parcel, and the remainder interest is worth only a small part of the price the city will have to pay for the two acres. The city attorney advises that at least one other state permits such remnant acquisitions, despite the area disparity between the parcels, on the ground that the larger parcel is

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53. See, e.g., *In re City of Rochester*, 137 N.Y. 243, 33 N.E. 320 (1893); *Luby v. City of Dallas*, 396 S.W.2d 192 (Tex. Civ. App. 1965).

54. See *LaSalle Nat'l Bank v. County Bd. of School Trustees*, 23 Ill. App. 3d 575 (1974), *aff'd*, 61 Ill. 2d 524, 337 N.E.2d 19 (1975), *cert. denied*, 425 U.S. 936 (1976).

55. Highway Law has provided most of the case law on the subject. See, e.g., *Luby v. City of Dallas*, 396 S.W.2d 192 (Tex. Civ. App. 1965). See also *Callies & Duerksen*, *supra* note 1, at 85-86; *Callies & Siemon*, *supra* note 20, at 23-24; Holloway, *Supplemental Condemnation: A Discussion of the Principles of Excess and Substitute Condemnation*, in 2 SELECTED STUDIES IN HIGHWAY LAW 767-86 (J. Vance ed. 1976) [hereinafter cited as Holloway]; MAIN REPORT, *supra* note 27, at 42-47. Many jurisdictions provide for such remnant acquisition by statute. See, e.g., HAW. REV. STAT. § 46-6 (1968) (Each county shall have the following specific powers: To take private property . . . and also to take such excess over that needed for such public use or public improvement in cases where small remnants would otherwise be left. *Id.* (Emphasis added)).

56. Uniform Relocation Assistance Act of 1975, 42 U.S.C. §§ 4601-4638 (Supp. V 1976).

in fact a "financial" remnant.<sup>57</sup>

4. *Physical Protection.* The three downtown stops vary in character, and the chief of police advises that in order to adequately protect the stops from vandalism and other assorted urban incursions on both property and patrons, he would like to see a "ring" of extra property acquired. He is particularly concerned about the at-grade urban stop in a redevelopment district.<sup>58</sup> The city attorney will approve such an acquisition, provided the rationale is spelled out in the plan, primarily because of the vast powers the city redevelopment agency has to condemn and develop land. He believes such an acquisition is supported by the plethora of cases in other jurisdictions upholding acquisitions for the protection of reservoirs, dams,<sup>59</sup> and

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57. The Supreme Court of California construed and upheld CAL. STS. & HY. CODE § 104.1 (West 1956), quoted in note 55 *supra*, in *People v. The Superior Court of Merced County*, 66 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968), and held that a "remnant" as large as 54 acres could be condemned under the remnant theory of excess condemnation when it could probably be condemned for a little more than the cost of taking the one-half acre needed for highway purposes, and paying damages for the remainder, which would become land-locked. *Id.* at 212-13, 436 P.2d at 346, 65 Cal. Rptr. at 346.

Although a parcel of 54 land locked acres is not a physical remnant, it is a financial remnant: its value as a land locked parcel is such that severance damages might equal its value. Remnant takings have long been considered proper. *Id.* at 212-13, 436 P.2d at 346, 65 Cal. Rptr. at 346.

58. See, e.g., *City of Boston v. Talbot*, 206 Mass. 82, 91 N.E. 1014 (1910).

59. See, e.g., *Staplin v. Canal Auth.*, 208 So. 2d 853 (Fla. Dist. Ct. App. 1968); *Culley v. Pearl River Indus. Comm'n*, 234 Miss. 788, 108 So. 2d 390 (1959); *Cuglar v. Power Auth.*, 4 Misc. 2d 879, 163 N.Y.S.2d 902, *aff'd mem.*, 4 App. Div. 2d 801, 164 N.Y.S.2d 686, *aff'd mem.*, 3 N.Y.2d 1006, 147 N.E.2d 733, 170 N.Y.S.2d 341 (1957); *McInnis v. Brown County Water Improvement Dist. No. 1*, 41 S.W.2d 741 (Tex. Civ. App. 1931). The rule is perhaps best stated in *Truitt v. Borough of Ambridge Water Auth.*, 389 Pa. 429, 133 A.2d 797 (1957):

We must bear in mind that in acquiring land for the purpose of an impounding reservoir for the storage of water for human consumption something more is needed than the absolute control of the water basin up to the maximum flood water stage. . . . Any supplier of water must keep a strict and vigilant watch not only over the reservoir itself but also over the avenues of approach thereto from the watershed for the purpose of reducing to a minimum the dangers that arise from the intake of surface water coming down from the watershed. To this end a careful supplier of water will acquire land necessary not only for the actual impounding of the water but also for a protective area for the water thus impounded. The provision of such a protective area will insure, so far as possible, the purity of the water destined for human needs.

*Id.* at 433, 133 A.2d at 799.



highways.<sup>60</sup> However, he recommends that such "protective" acqui-

Some states have constitutional and statutory provisions for such protective zones for highways, as the following examples from New Jersey and California illustrate:

The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

CAL. CONST. art. I, § 14 1/2 (adopted 1928, *repealed* 1974).

Any agency or political subdivision of the State or any agency of a political subdivision thereof, which may be empowered to take or otherwise acquire private property for any public highway, parkway, airport, place, improvement, or use . . . may be authorized by law to take or otherwise acquire a fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property *to preserve and protect* the public highway, parkway [etc.].

N.J. CONST. art. IV, § 6, n.3 (Emphasis added).

California's new eminent domain statute specifically authorizes "protective acquisitions" generally:

(a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.

CAL. CIV. PROC. CODE § 1240.120 (Deering Supp. 1978).

According to the Los Angeles City Attorney's Office, public agencies are now in a more favorable position regarding protective acquisitions than they were prior to the repeal of Article I, § 14 1/2 of the California Constitution in 1974. The new Eminent Domain Law apparently does not contain any distance limitations for protective acquisitions, and seems to be only a codification of existing California case law which permits "taking incidental property to carry out and make effective the principal uses involved." *See City of Santa Barbara v. Cloer*, 216 Cal. App. 2d 127, 30 Cal. Rptr. 743 (1963).

60. The provisions in N.J. CONST. art. IV, § 6, and CAL. CONST. art. I, § 14 1/2, both apply to highways. *See* note 59 *supra*. In addition, there are cases which also

sitions, as well as the so-called "economic viability" and "future use" acquisitions, be specifically addressed in the new transit code amendments previously discussed.

5. *Economic Viability Acquisitions and Public Purpose.* Metropolis would like to help guarantee the success of its considerable investment in the system. It hopes to do this by assuring that development which will utilize the fixed guideway system takes place in the closest possible proximity to proposed transit stops, and also by participating in the potentially lucrative development situation.<sup>61</sup> Although Metropolis is relatively free to offer various land use "bonuses" to attract development into the narrow transit corridor,<sup>62</sup> the city attorney has already advised that it must take great care in exercising its local zoning powers to coerce development, lest it fall afoul of traditional notions concerning the scope of the police power and its effect on property rights. Of course, the city attorney has also advised that

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approve such acquisitions. See *Barrett v. State Highway Dep't*, 211 Ga. 876, 89 S.E.2d 652 (1955); *White v. Johnson*, 148 S.C. 488, 146 S.E. 411 (1929).

61. The question of supplemental or excess condemnation was of considerable interest to scholars and commentators in the 1930's, many of whom favored expansion of the doctrine. See *Bender, Excess Condemnation in Wisconsin*, 13 MARQ. L. REV. 69 (1929); *Hart, Excess Condemnation as a Solution of Some Problems of Urban Life*, 11 MARQ. L. REV. 222 (1927); *Steiner, Excess Condemnation*, 3 MO. L. REV. 1 (1938); *Note, The Constitutionality of Excess Condemnation*, 46 COLUM. L. REV. 108 (1946). Basically, this policy favors the acquisition of real property by eminent domain for the purpose of generating income to offset expected losses from the enterprise to which a principal and adjacent condemnation relates. Usually, there is contemplated some private development on the parcel involved which is related to or serves the principal project. For a concise but thorough treatment of this subject, see *Holloway, supra* note 55. See also *Callies & Duerksen, supra* note 1, at 77; *Callies & Siemon, supra* note 20, at 19; *Legal Element, supra* note 20, at 1-32; *MAIN REPORT, supra* note 27, at 55-66.

As at least one commentator has noted, the tendency in some jurisdictions has clearly permitted more of such acquisitions, provided there is some relation of the commercial venture to the public work which forms the basis for the principal eminent domain acquisition. Much of this law relates to highways rather than fixed guideway rapid transit systems. *Holloway, supra* note 55, at 770-71, 776. Others have noted an increase in courts' willingness to uphold such acquisitions for eventual redevelopment by private interests. See *Barton-Aschman Associates, Multiple Use of Lands Within Highway Rights-of-Way*, in NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT No. 53 54 (1968).

62. A number of jurisdictions use this technique, among the most well-known of which is New York. See URBAN LAND INSTITUTE, LEGAL ASPECTS OF PLANNED URBAN DEVELOPMENT (1965) (Tech. Bull. No. 52).

such transit corridor zoning<sup>63</sup> will be judicially palatable if it is in accordance with a comprehensive and well-documented land use plan for the city.<sup>64</sup> Indeed, one state has such an ordinance drafted for its largest city,<sup>65</sup> and several others already contemplate something similar.<sup>66</sup>

The city attorney advises that economic viability doctrines have been upheld in several port authority cases where extra land was condemned to lease back to private container, shipping, and other interests,<sup>67</sup> and in cases where the commercial ventures actually served the

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63. Transit corridor zoning has been most successfully used in Toronto, where a metrogov of sorts controls a vastly larger land area and where there is virtually no theory under which a restricted owner can claim a constitutionally protected, and hence compensable, taking for undue property restrictions. HOLMES, *supra* note 21, at 105-27.

64. The requirements for such a plan have long been recognized. See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

65. HONOLULU, HAWAII, BILL 78 (1977) is the draft of a transit corridor zoning ordinance. It has not yet been passed, however, because the counsel to the City Council publicly expressed concern about certain discretionary approval powers it purports to grant without definitive standards. Interview with Wilfred Mita, Deputy Director of Council Services, City & County of Honolulu in Honolulu, Haw. (November 1977).

66. *E.g.*, Miami and Atlanta. Interview with Woodrow Moore, Chief Planner, Miami-Dade County Dep't. of Transp., Rapid Transit Division, in Miami, Fla. (June 1978); interviews with William Christian, Atlanta Regional Comm'n, and Larry Thompson and Jay Levine, Counsel to MARTA, in Atlanta, Ga. (June 1978).

67. *Sublett v. City of Tulsa*, 405 P.2d 185 (Okla. 1965); *Port of Umatilla v. Richmond*, 212 Or. 596, 321 P.2d 338 (1958); *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137 (Tex. 1954).

As in Texas, authorities responsible for the creation and development of ports are given broad power to condemn in Kentucky. A riverport authority may by condemnation acquire facilities, but may also "acquire and develop, property, or rights therein, within the economic environs of the riverport or proposed riverport to attract directly or indirectly river oriented industry." KY. REV. STAT. § 65.530(1) (1970). In fact, it may

acquire by contract, lease, purchase, option, gift, condemnation or otherwise *any real or personal property, or rights therein, necessary or suitable for establishing, developing, operating or expanding riverports, riverport facilities, water navigation facilities, including spoilage areas for the disposal of materials dredged from river bottoms in an effort to improve the navigability of rivers, and industrial parks or sites within the economic environs of the riverport or proposed riverport.* The authority may erect, equip, operate and maintain on such property buildings and equipment necessary and proper for riverport and water navigation facilities. The authority may dispose of any real or personal property, or rights therein, which in the opinion of the authority is not needed for use as riverport or water navigation facilities, or use as industrial parks or sites. *The authority may lease,*

travelling public, such as gas stations and restaurants along highways.<sup>68</sup> However, only one jurisdiction has upheld such takings for the *sole* purpose of guaranteeing the economic viability of a publicly-funded project *outside* of a redevelopment area.<sup>69</sup> Furthermore, most such cases have turned upon the presence of *specific* constitutional or statutory language declaring that such acquisition is in the public interest and for a public purpose,<sup>70</sup> and the case law interpreting such language and the general climate in the jurisdiction with respect to the breadth of public purpose.<sup>71</sup>

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*sell, convey, or assign its interest in land owned, optioned, or otherwise held by it to any person for the purpose of constructing and/or operating any industrial or commercial facility or for the purpose of acting as the authority's agent or licensee in effectively carrying out any of its powers and duties.*

*Id.* at § 65.530(4) (Emphasis added).

Acting under this broad grant of authority, the Louisville and Jefferson County Riverport Authority, after extensive investigation, is on the verge of developing an industrial park of approximately 1,750 acres, located southwest of the central business district on the east bank of the Ohio River. In the past few years the Authority has put together approximately 52 parcels of land, although using eminent domain to acquire only one of them.

In order to proceed with development, the Authority is seeking the rezoning of approximately 1,600 acres of the property to accommodate and permit the construction of river-oriented industry, public and private port facilities, ancillary industrial parks, and a management center for the Authority itself. The property has been "floodproofed." Presently, the property is zoned residential and has been leased back to the original owners to continue the present uses. The Authority contemplates a writ of lease and sale of this huge "bank" of industrial property to private interests. Permitted uses are covered in an extensive Master Plan. Conference with Col. Robert H. Allan, Executive Director and General Manager, Louisville and Jefferson County Riverport Authority (Sept. 16, 1975). [1974] LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY ANN. REP. SWINDELL-DRESSLER COMPANY, ENVIRONMENTAL ASSESSMENT OF THE RIVERPORT INDUSTRIAL DEVELOPMENT PROPOSAL BY THE RIVERPORT AUTHORITY, (1975); Yater, *Riverport: New Kingdom for the Southwest*, LOUISVILLE, July 1974, at 39.

68. *E.g.*, *In re Opinion of the Justices*, 330 Mass. 713, 113 N.E.2d 452 (1953).

69. *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963); *Bush Terminal Co. v. City of New York*, 282 N.Y. 306, 26 N.E.2d 269, 16 N.Y.S.2d (1940). California, relying on a number of such cases, upheld a condemnation in Hollywood for the purpose of leasing to the private sector an entertainment center. *County of Los Angeles v. Authority*, 224 Cal. App. 2d 102, 36 Cal. Rptr. 308 (1964).

70. New York courts approved such language in *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963). See OHIO CONST. art. 18, § 10, as set out in *City of Cincinnati v. Vester*, 33 F.2d 242, 243 n.1 (6th Cir. 1929), *rev'd on other grounds*, 281 U.S. 439 (1930).

71. See, e.g., *Petty v. Hospital Auth. of Douglas County*, 233 Ga. 109, 210 S.E.2d 317 (1974); *Tift v. Atlantic Coast Line Ry.*, 161 Ga. 432, 131 S.E. 46 (1925) (upholding

According to the city attorney's research, the local judiciary has generally sustained any legislative declaration of public purpose with respect to eminent domain authorizations, but has never ruled on an "economic viability" taking. However, the courts once looked to the case law upholding redevelopment takings in connection with a "future use" taking. Therefore, the city attorney advises the city that if suitable amendatory language is inserted in the new transit code, a substantial argument in favor of such economic viability takings can be made by referring to the redevelopment cases. He suggests, however, that the case would be strengthened by amending the city charter or state constitution to provide language similar to that found in the Ohio Constitution<sup>72</sup> and the New York statutes<sup>73</sup> with respect to economic ventures. He cautions that, regardless of the language added, it is unlikely the courts will permit the city to condemn parcels for the sole purpose of resale in order to defray the costs of the system.<sup>74</sup>

#### D. *Monetary Transfers*

The city would like to levy an assessment on the owners of commercial centers adjacent to proposed transit stations on the theory that the improved public accessibility is a benefit conferred specially upon these property owners.<sup>75</sup> The rationale is identical to the one

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condemnation for warehouses and depots for the accommodation of businesses); *Louisville and Nashville Ry. v. Maxey*, 139 Ga. 541, 77 S.E. 801 (1912).

72. OHIO CONST. art. 18, § 10.

73. N.Y. UNCONSOL. LAWS §§ 6601-6618 (65 McKinney Supp. 1978-1979).

74. *City of Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929) *rev'd on other grounds*, 281 U.S. 439 (1930).

75. See, e.g., *Callies & Duerksen*, *supra* note 1, at 86-89; *Callies & Siemon*, *supra* note 20, at 40; Hayes, *Rapid Transit Financing: Use of the Special Assessment*, 29 STAN. L. REV. 795 (1977) [hereinafter cited as Hayes]; *Legal Element*, *supra* note 20, at 34-40.

The use of special assessment districts to finance rapid transit systems would provide needed funds in an equitable manner. The financing technique can generate a significant amount of capital and, because the rapid transit assessment can be modeled on traditional special assessment statutes, it is a legally dependable financing mechanism. Nonconstitutional legal challenges to the rapid transit assessment procedure are likely to fail as they do under traditional assessment statutes, and equal protection voting challenges, though more problematic, also are surmountable.

*Id.* at 817-18.

For a less sanguine view, see R. SHAWCROFT, E. NORWOOD & M. LESTER, *POTENTIAL FOR BETTERMENT DISTRICT FINANCING AND JOINT DEVELOPMENT APPLICATIONS* (1978).

which underlies abutting property assessments for street widenings, sidewalks, and water/sewer lines,<sup>76</sup> and similar to that for assessing commercial owners for all or a portion of the cost of turning their block into a pedestrian mall, for which there are specific procedures in some state statutes.<sup>77</sup>

TIONS TO SURFACE TRANSIT. (July 1977) (Research Rep. No. 77-7 Urban Transp. Program, Dep'ts Civ. Eng. & Urban Planning, Univ. Of Wash., Seattle).

Moreover, it is worth noting that not every commercial property owner is always pleased to see the development of a fixed guideway rapid transit system nearby. Alleging a variety of inconveniences and damages caused by the construction of MARTA, the "unique entertainment complex" known as Underground Atlanta has sued MARTA through the Underground Atlanta Merchants Association on a theory of inverse condemnation, based primarily on the alleged difficulty of access to the area because of MARTA's construction. A separate and similar action has been filed by the corporation that owns and operates two separate establishments in Underground Atlanta. See *Underground Atlanta Merchants Ass'n v. Metropolitan Atlanta Rapid Transit Auth.*, No. C-37912, (Super. Ct. of Fulton County, Ga. 1978); *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, No. C-2863, (Super. Ct. of Fulton County, Ga. 1978). Both allege impairment of light and air and other damage as well, as the following excerpts from the Downside Risk complaint demonstrate:

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Furthermore, in the process of constructing the aforementioned rapid transit station, MARTA has obstructed and closed Old Pryor Street at a point slightly east of its intersection with Old Alabama Street, and has thereby wholly negated and impaired the use of said street by persons desiring to enter Underground Atlanta via Old Pryor Street from an easterly direction. As a result of the closing of Old Pryor Street, plaintiff has been deprived of a major artery of access to its premises and the valuable stream of commerce provided by said artery. . . . That due to the negligent and improper manner in which said improvements have been and continue to be constructed, defendant MARTA has created a blemish and eyesore directly in front of plaintiff's commercial establishment as to amount to a present and continuing nuisance. . . . That as a direct result of the aforementioned activities of the defendant MARTA, the easement of light, air and scenic view to plaintiff's leasehold estate has been wholly negated, to the great and substantial detriment of said property, without the prior payment of just compensation therefor in violation of Art. I, § 3, Par. 1 of the Constitution of the State of Georgia (GA. CODE ANN. § 2-301, as amended).  
Complaint, *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, No. C-2863, (Super. Ct. of Fulton County, Ga. 1978). It may be that various value capture techniques would be useful in offsetting such claims.

76. See, e.g., *Shell Isle Homes, Inc. v. City of St. Petersburg*, 199 So. 2d 525 (Fla. Dist. Ct. App. 1967); *City of Gainesville v. McCreary*, 66 Fla. 504, 63 So. 914 (1913); 29A FLA. JUR., *Special Assessments* § 9.

77. See, e.g., KY. REV. STAT. ANN. §§ 93A.010-.030 (Baldwin 1977).

The general assembly of the Commonwealth of Kentucky finds as a fact that the preservation of downtown areas of cities is vital to the health, safety and material well-being of the citizens and inhabitants thereof, and that the construction and installation of pedestrian mall projects will contribute to the safe and

As the city attorney points out, while the theory may be sound, at

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effective movement of persons, and serve the public health, safety, convenience, enjoyment and general welfare. The governing body of a city, to protect and serve the public safety, convenience and welfare and the interests of the public in the safe and effective movement of persons, and to preserve and enhance the function, appearance and economic viability of the central mercantile and business areas of such city, may initiate, construct, install and establish a pedestrian mall project in the manner herein provided, at the exclusive cost of the owners of land located in the pedestrian mall benefit area, which is benefited by a pedestrian mall project. . . .

(12) "Pedestrian mall benefit area" means and shall include all of the land (except such as is located in a public way) which the governing body of the city by ordinance determines will be benefited by a pedestrian mall project, including specifically all land abutting directly on both sides of such project, and said pedestrian mall benefit area, may, if such benefit be so determined, include all of the land in each square block one side of which abuts or fronts upon a pedestrian mall; provided that lands not directly abutting a project shall be assessed at a lesser ratio, as provided in KRS 93A.030 . . . .

(1) The general assembly of the Commonwealth of Kentucky determines as a legislative finding of fact that the initiation, construction, installation and establishment of a pedestrian mall project pursuant to the authority contained in this chapter constitutes a direct, physical, material and substantial benefit to land fronting and abutting directly upon said pedestrian mall project; *and may, directly, physically, materially and substantially benefit the land other than that land directly fronting and abutting upon the pedestrian mall project which is situated within every square block, a portion of which directly abuts a pedestrian mall project*, if said benefit is so established and determined by the governing body of a city instituting such project. However, that land situated within such square blocks not directly fronting and abutting upon a pedestrian mall project, where benefited, is recognized to be directly, physically, materially and substantially benefited to a lesser degree than land directly fronting and abutting upon such pedestrian mall project.

(2) The governing body of a city instituting, installing, constructing and establishing a pedestrian mall project shall, based upon a careful study of the facts involved, determine the nature and scope of the area of land benefited by the pedestrian mall project. The governing body may, if benefit be determined to inure to land other than that fronting and abutting directly upon a pedestrian mall project, ordain and determine that such land other than land directly fronting and abutting upon the project is benefited by such project; provided, however, that in such event the benefited land other than that directly fronting and abutting upon the pedestrian mall project shall not be assessed to an extent greater than as hereinafter set forth.

(3) In the event the governing body shall determine that land directly fronting and abutting on a pedestrian mall project is the only land benefited by said project, such land shall be the only property included in the pedestrian mall benefit area, and shall be assessed the entire costs of the project, on the assessed value basis authorized by KRS Chapter 107, as hereinafter provided. *In the event the governing body shall determine that the pedestrian mall project will benefit all properties situated within every square block abutting upon a pedestrian mall project, the pedestrian mall benefit area shall be divided into two special benefit assess-*

the very least a charter amendment, if not a state statute, would have to be passed specifically authorizing such a "special benefits" assessment.<sup>78</sup> Moreover, questions of valuation and assessment could get quite complicated.<sup>79</sup> However, the city attorney is satisfied that as long as the amounts assessed are reasonable, the state courts will not question the amount of special benefit deemed conferred on local property owners by the location of a nearby transit stop.<sup>80</sup> He recom-

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*ment zones, to be identified as zone one benefited land and zone two benefited land. Zone one benefited land shall include all land fronting and abutting on the pedestrian mall project to the depth of each parcel of land which fronts on said pedestrian mall project; provided, however, that zone one benefited land shall be assessed only to a depth from the pedestrian mall project of 210 feet, it being determined as a legislative finding of fact that direct, physical, material, and substantial benefits of the nature resulting from abutting directly upon such project do not accrue to properties which are situated at a distance from the pedestrian mall project exceeding 210 feet. All of the remaining land situated within any square block fronting upon a pedestrian mall project shall be classified as zone two benefited land.*

(4) In levying improvement benefit assessments against all benefited lands situated within the geographical boundaries of the pedestrian mall benefit area, as such area is defined by ordinance adopted by the governing body, in the event the governing body has determined that all property situated within every square block abutting upon a pedestrian mall project shall be benefited by the project, and that all such property shall consequently be classified as zone one benefited land and zone two benefited land, not less than eighty percent of the total amount of improvement benefit assessments levied in each year shall be levied against and collected from the owners of the land classified as zone one benefited land, and the remainder of the total amount of improvement benefit assessments levied in each year shall be levied against and collected from the owners of the land classified as zone two benefited land. All such assessments to be made on the assessed value basis.

*Id.* at § 93A.010(12), .020, .030 (Emphasis added). See also HAW. REV. STAT. § 46-78 (1968); HONOLULU, HAWAII, REV. ORD. § 24-3.1 (1969). Non-abutting assessments for parking were specifically upheld in *Schnack v. City and County of Honolulu*, 41 Haw. 219 (1955).

78. See *Roberts v. Evanston*, 218 Ill. 296, 75 N.E. 923 (1905); *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N.W. 255 (1900). But see *Johnson v. City of Inkster*, 56 Mich. App. 581, 224 N.W.2d 664 (1974), *rev'd*, 401 Mich. 263, 258 N.W.2d 24 (1977), in which the Charter of the City of Inkster so provided, and a non-abutting assessment extending 1,500 feet to either side of a road was first approved and then struck down on appeal. For discussion of issues, see Batchelder, *supra* note 20, at 12-19.

79. For courts troubled about computation of benefits, see *Fisher v. Bd. of County Comm'rs*, 84 So. 2d 572 (Fla. 1956); *Crowder v. Phillips*, 146 Fla. 428, 1 So. 2d 629 (1941). This matter was of sufficient concern to BART officials in San Francisco that the special benefits assessment statute, note 81 *infra*, was never used. Some courts are *not*, however, so troubled by the matter of valuation. See, e.g., *Paterson v. City of Bismarck*, 212 N.W.2d 374 (N.D. 1973).

80. See *City of Hallandale v. Meeking*, 237 So. 2d 318 (Fla. App. 1970); *Ocean Beach Hotel Co. v. Town of Atlantic Beach*, 147 Fla. 445, 2 So. 2d 879 (Fla. 1941);



mends drawing concentric rings around the stop or stops in question and establishing separate declining rates of assessment for each district radiating out from the station, much as is provided in the State of California for transit stations.<sup>81</sup>

The city is also interested in utilizing a tax allocation scheme so

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Brock v. Lemke, 51 Haw. 175, 455 P.2d 1 (1969); Schnack v. City and County of Honolulu, 41 Haw. 219 (1955); Taylor v. City and County of Honolulu, 25 Haw. 58 (1919); McCandless v. City and County of Honolulu, 24 Haw. 524 (1918).

81. CAL. PUB. UTIL. CODE § 99001 (West 1973):

The legislative body of any city or the board of supervisors of any city and county may establish one or more special benefit districts within the city and county pursuant to this chapter.

Any special benefit district may contain separate zones, which may consist of either contiguous or noncontiguous areas of land within the city or city and county. Each zone within a special benefit district shall be an area adjacent to a station of the municipal transportation system or along the route or lines of such system which the legislative body or board of supervisors determines will receive special benefit by reason of the operation of transportation facilities but all zones within a special benefit district need not be adjacent to the same station or adjacent to the same portion of the route or lines.

*Id.*

The California special benefit district legislation performs several important functions. First, it represents a declaration by the legislature that special benefits may accrue to property *along a mass transit line*. Although a property owner may claim that his land receives no special benefit, the courts give great weight to this legislative determination. Thus, once the powers herein are granted to the local transit district and that district lays out the special benefit districts, the burden to show that certain land is not specially benefited is placed upon the landowner.

Second, the legislation specifically allows for the creation of several special benefit districts within one transit district (around each transit station). Moreover, each special benefit district itself may contain separate zones. These provisions give the transit district considerable flexibility in apportioning costs in direct proportion to benefits. Instead of assessing only property adjacent to the transit station (as in the typical street assessment), the district may set up zones with assessments decreasing in proportion to the distance from the transit stop.

This piece of legislation has never been used. Much of BART's acquisition program was completed by the time the so-called Mills Bill became law. Moreover, on advice of counsel, BART officials were apparently particularly concerned with the effect of protracted hearings and litigation over such new financing upon its programs. Finally, the method of establishing the criteria for ascertaining incremental value was thought to be too difficult, often resulting in arbitrary decisions. It was also thought that sufficient benefit would accrue to BART through its district taxing mechanism values in Marin County caused by the development of BART.

Moreover, according to the sponsor of the original legislation, Senator James Mills, the use of special benefit assessments in the future is extremely unlikely. First, most extensions would go in the taxing district from which money to finance BART has already been collected. Property owners there are not likely to vote themselves additional taxes. Second, for similar reasons, those *presently* benefiting by proximity to the line are without incentive altogether to vote themselves additional taxes. While it

that it is guaranteed a certain percentage of the county ad valorem real property tax revenue increases attributable to the fixed guideway stations. The system, which is used in connection with redevelopment districts, is called tax increment financing. It is used extensively throughout California and is becoming increasingly popular around the country.<sup>82</sup> The city is particularly interested in the scheme as an alternative to other value capture techniques in the downtown area, certain core areas, and as perhaps the only acceptable technique in nearby suburban areas. Some of the other value capture techniques may appear socialistic or appear to lay the groundwork for tax increases, both an anathema to the suburban residents.

The city attorney advises Metropolis of a need for state enabling legislation specifically authorizing tax increment financing. Based

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would be possible to use special benefit assessment for a new system, such as in Los Angeles, Mills is not aware of any entity in California interested in using it.

See also IND. CODE § 19-5, ch. 7.6 (1976), which is substantially similar for transit purposes; Hagman, *supra* note 20, at 362, n.76.

82. Basically, tax increment financing is a method by which one municipal agency, usually a general purpose government, pledges all or a portion of the incremental tax revenue resulting from a public improvement or development paid for by a second agency, to that agency in order to pay it back. The pledge is generally the *quid pro quo* demanded by the second agency before it will undertake the development and is a device for financing the project. It is a reallocation of the value added among governmental units permitting a portion of increment to be segregated for specific purposes rather than placed in a general fund. Callies & Siemon, *supra* note 20, at 40-41.

The future of tax increment financing may be clouded in California by Proposition 13, which passed on June 6, 1978. This initiative, the result of substantial taxpayer disaffection with tax increases accompanying real property value increases, substantially affects the marketability of tax allocation bonds. Moody's, the well-known bond rating service, had already suspended ratings on all \$1.6 billion existing California tax allocation bonds pending the outcome of the referendum. Wong, *Householders Revolt: Referendum for Slashing Property Tax Alarms California Establishment; Close Vote Foreseen*, Wall St. J., May 10, 1978, at 46.

A number of states are considering tax increment financing. See, e.g., FLA. STAT. ANN. § 163.387 (West 1978); RALPH ANDERSON AND ASSOCIATES, REDEVELOPMENT AND TAX INCREMENT FINANCING BY CITIES AND COUNTIES IN CALIFORNIA (1976); Batchelder, *supra* note 20, at 19-22; Atlanta Regional Council Staff, Selected Value Capture Opportunities Related to the Rapid Transit System in Metropolitan Atlanta 12 (Working Paper draft of January 1978). Moreover, the State Supreme Courts in both Iowa (Richards v. City of Muscatine, 237 N.W.2d 48 (Ia. 1975)) and Utah (Tribe v. Salt Lake City Corp., 540 P.2d 499 (1975)) have had occasion to pass on their states' tax increment financing laws in the context of urban development schemes. Both approved. However, the Supreme Court of Kentucky struck down that state's tax increment financing statute in Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976) (regarding a problem with school financing alleged to be unique to Kentucky).

upon his examination of statutes in other jurisdictions,<sup>83</sup> he recommends that the city sponsor a statute that would set out the manner of creating a tax increment financing district,<sup>84</sup> and establish the specific amount of ad valorem real property tax revenues from the district area which a general purpose government may pledge or commit to the project.<sup>85</sup> Because other jurisdictions tend to underestimate the added drain on services that such projects cause the general purpose government, the city attorney recommends this limit be set at eighty per cent of the increment over a base year. Finally, the statute would make clear that the fund set up to receive the tax increment payments is the sole source for retiring any bonds issued by the district or special purchasing agency.<sup>86</sup> The city attorney notes, however, that this may result in a substantial discounting of the bonds, as the increment level may be perceived by investors as speculative.

### E. *Intergovernmental Relations*

A portion of the proposed rapid transit system will be located outside the city's boundaries. Absent special legislation, Metropolis' transportation department will have no jurisdiction over that portion absent interlocal or intergovernmental agreements with the other affected general purpose governments.<sup>87</sup> As noted above, the state con-

83. CAL. CONST. art. 16, § 16; Ga. HR No. 162-686, to amend GA. CONST. art. IX, § IV.

84. *E.g.*, UTAH CODE ANN. § 11-19-25 (Supp. 1974).

85. *E.g.*, FLA. STAT. ANN. § 163.387 (West 1978)

The annual funding of the redevelopment trust fund shall be in an amount not less than that increment in the income, proceeds, revenues and funds of the county or municipality derived from or held in connection with its undertaking and carrying out of community redevelopment projects under this part. Such increment shall be determined annually and should be that amount equal to the difference between:

(a) that amount of ad valorem taxes levied each year by all taxing authorities except school districts on taxable real property contained within the geographic boundaries of a community redevelopment project; and

(b) that amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for all taxing authorities except school districts upon the total of the assessed value of the taxable property in the community redevelopment project as shown upon the assessment role used in connection with the taxation of such property by each taxing authority, last equalized prior to the effective date of the ordinance approving the community redevelopment plan.

*Id.*

86. *E.g.*, FLA. STAT. ANN. § 163.387 (West 1978).

87. A number of jurisdictions have proceeded with interlocal agreements in a va-

stitution allows such agreements, specifically permitting any local government to exercise any of its powers on behalf of another in accordance with a duly approved local government agreement.<sup>88</sup>

The city attorney recommends a series of joint powers agreements to coordinate development at all stops along the system, together with a sharing of the costs on a *pro rata* basis. Any party to such agreements would have the right to take enforcement action.

In addition, the city attorney recommends another set of agreements with special purpose agencies such as school districts, park districts, and urban renewal districts, which would provide a coordinated use of eminent domain powers to strengthen any weak "public purpose" exercise of such powers. The city attorney recommends that a joint powers agreement be executed, specifically giving the city the right to exercise the power of eminent domain on behalf of all signatories to streamline the acquisition of land around transit

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riety of forms to undertake joint projects, especially in highway rights of way. RIVKIN & ASSOCIATES, INC., ACQUISITIONS OF LAND FOR JOINT HIGHWAYS & COMMUNITY DEVELOPMENT CASE STUDIES (1976) (U.S. Dep't. of Transp. DOT-FH-U-8848, NTIS PB 273 399). Many others are in the planning or early construction steps with respect to fixed guideway rapid transit systems. See, e.g., *Joint Development Applications*, *supra* note 20. Some states provide by statute for interlocal cooperation for transit systems.

(1) In addition to all other powers and rights granted by KRS Chapter 96A, public bodies are expressly authorized and empowered to enter into joint agreements and multi-municipal compacts with transit authorities, and all other units of government, both federal and state, for the acquisition, maintenance and operation of mass transportation facilities. Any such agreements may provide for proportionate payments by such public bodies for transit purposes based upon any reasonable criteria, including, but not by way of limitation, population and actual mass transit services rendered.

(2) Any such joint agreement or multi-municipal compact may provide by its terms that notwithstanding the fact that a mass transportation program, together with the source of funding therefor, has been approved by the electorate or electorates of one or more of such public bodies, any such public body may, in any annual period, in lieu of utilizing such source of funding as approved by the electorate of any such public body, use and apply for purposes of making payments or contributions under such joint agreement or multi-municipal compact any other funds of such public body legally available therefor. Provided, however, that any source of funding approved by the electorate in connection with the approval of such a mass transportation program shall not, as a result of such permissive funding by any such public body from other legally available sources, be rendered void or negatory.

KY. REV. STAT. § 96A 370 (1976).

88. See, e.g., joint powers agreements executed on behalf of various governmental entities in the BART service region, pursuant to California statutes. See also PA. CONST. art. 9, § 5.

stops. Thus, for example, the city could condemn land for a school if the school district were a party, or for a park if the park district were a party, and utilize the land in the interim for value capture purposes.

### CONCLUSION

And so our story ends—or at least the financing chapter of it. The city and its governmental partners will likely opt to utilize a variety of the various financing techniques, depending upon the factual circumstances surrounding each proposed stop:

- (a) Is it a primarily developed or primarily undeveloped area?
- (b) Is the city attempting to attract development or guide and shape the expansion of what is already there?
- (c) How strong are the economic forces attracting or repelling development?
- (d) To what extent would protracted litigation unreasonably delay development of the transit system?

It is a judicious mix of the techniques that will best serve the interests of both private and public sectors in developing a joint development/value capture policy.

There is, of course, a plethora of further concerns which a city and its counsel must address in the course of developing a rapid transit system. Additional sources of funding may be available from the federal government, with varying criteria for each source. An analysis of UMTA legislation alone discloses several sources, each with different requirements. In addition, funds are available elsewhere in the Department of Transportation and from other federal departments and their respective agencies, as well. The city will carefully consider the form of the lead government agency, especially in its developer's role. The perspective above is primarily from that of joint development/value capture financing. UMTA has begun to investigate the use of Transit Corridor Development Corporations (TCDC's).<sup>89</sup> With a grant from UMTA, Portland, Oregon, is cur-

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89. Much of the language in the so-called "Young Amendment", Urban Mass Transportation Act of 1964, 49 U.S.C. § 1602(a)(1)(A)(1975), which specifically authorized TCDC's was deleted in the major overhauling of UMTA's governing statute that is the new Surface Transportation Act of 1978. However, joint development *per se* was much strengthened. *See id.* at § 302(A)(1)(D):

[T]ransportation projects which enhance the effectiveness of any mass transportation project and are physically or functionally related to such mass transportation project or which create new or enhanced coordination between public transportation and other forms of transportation, either of which enhance urban economic development or incorporate private investment including commercial

rently investigating how such a corporation might be utilized to develop a whole transportation system.

Each of these issues—and the list is by no means either comprehensive or definitive—requires careful examination during the course of developing a rapid transit system. With the growth of existing systems and the planning and construction of new ones in the past ten years it should be comparatively no time at all until practical answers are at hand.

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and residential development. The term "eligible costs" includes property acquisition, demolition of existing structures, site preparation, utilities, building foundations, walkways, open space, and the acquisition, construction, and improvement of facilities and equipment for intermodal transfer facilities and transit malls, but does not include the construction of commercial revenue-producing facilities, whether publicly or privately owned, or of those portions of public facilities not related to mass transportation. The Secretary shall require that all grants and loans under this paragraph be subject to such terms, conditions, requirements, and provisions as the Secretary determines necessary or appropriate for purposes of this section, including requirements for the disposition of net increases in value of real property resulting from the project assisted under this section. The Secretary shall require in all grants and loans under this subparagraph that any person or entity that contracts to occupy space in facilities funded under this subparagraph shall pay a fair share of the costs of such facilities, through rental payments and other means.